Federal Court  Cour fédérale

Date: 20221212

Docket: DES-6-22

Citation: 2022 FC 1707

Ottawa, Ontario, December 12, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

DANIEL BILAK AND UKRAINIAN WORLD CONGRESS

Respondents

ORDER AND REASONS

[1] The Attorney General of Canada [AGC] filed a Notice of Application (as amended) on August 15, 2022 pursuant to section 38.04 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] [the Section 38 Application] seeking an order confirming the statutory prohibition of disclosure of certain sensitive or potentially injurious information. That information was included in documents that Global Affairs Canada (GAC) produced to the Respondents in redacted form as the Certified Tribunal Record [CTR] in connection with the Respondents'

Application for Judicial Review of a decision of the Minister of Foreign Affairs (Court File T-1439-22).

[2] The CTR is comprised of: an eight page Memorandum for Action to the Minister of Foreign Affairs [the Memo], which has been redacted to protect commercially sensitive third party information, solicitor-client privileged information, and the sensitive or potentially injurious information that is the subject of the Section 38 Application; and, the Permit issued pursuant to the *Special Economic Measures (Russia) Permit Authorization Order* (P.C. 2014-58, SOR/2014-59) of March 2014, in respect of the *Special Economic Measures (Russia) Regulations* [*Regulations*], which is not redacted.

[3] The AGC seeks to have the prohibition on the disclosure of the redacted information confirmed by the Court. The *amicus curiae* (*amicus*), Mr. Howard Krongold, who was appointed by the Court by Order dated September 27, 2022, submits that disclosure of the redacted information would not be injurious.

[4] A public hearing was not held. The Respondents agreed that a public hearing would not likely be necessary or of assistance to them and that the *in camera ex parte* hearing should proceed expeditiously in order for the Court to determine the Section 38 Application and to ensure that the Application for Judicial Review could proceed as scheduled. The *in camera ex parte* hearing was held on November 30, 2022. The Court considered the confidential affidavits filed by the AGC, the evidence of the AGC's witness, and the submissions of Counsel for the AGC and the *amicus*. The Court also considered the Respondents' Notice of Application for

Judicial Review, which set out the grounds for their challenge to the decision of the Minister of Foreign Affairs.

[5] The issue on the Section 38 Application is whether the prohibition to disclose the information identified by the AGC in the document at issue – the Memo – as provided for in paragraph 38.02(1)(a) of the CEA, should be confirmed by this Court pursuant to subsection 38.06(3), or whether disclosure should be authorized, in full or subject to certain conditions, pursuant to subsections 38.06(1) or (2).

[6] The Court finds that, subject to the lifting of some redactions as authorized by the AGC shortly before the *in camera ex parte* hearing, the prohibition on disclosure of the remaining redactions must be confirmed.

I. Background

[7] The Application for Judicial Review challenges the decision of the Minister of Foreign Affairs to issue a Permit, which exempts Siemens Canada Limited or Siemens Energy Canada Limited [Siemens] from the *Regulations* made pursuant to the *Special Economic Measures Act* , SC, 1992 c 17 (as amended) [SEMA]. The Permit allows Siemens to continue to provide engineering and maintenance support on specialized turbine engines that are used to transmit natural gas from Russia to Germany via the Nord Stream 1 pipeline. The turbines are owned by Gazprom, a Russian company, and are maintained and regularly serviced by Siemens in Canada. Siemens' specialized facility in Canada is the only facility that can provide the

necessary maintenance. Siemens' practice is to service one or more turbines on a regular schedule and deliver or arrange for their export and delivery from Canada to Gazprom.

[8] The Respondents' position, described in much more detail in their Notice of Application for Judicial Review, is that the Minister's decision to issue the Permit is unreasonable and, as a result, is not authorized by the *Regulations* and/or the SEMA. The Respondents argue that the issuance of the Permit is not justified or transparent and is contrary to the Government's commitment to support the Ukraine and to sanction Russia, including through the *Regulations*. The Respondents seek, among other relief, an interim declaration that the decision is unreasonable and a suspension of its effect pending the determination of their Application for Judicial Review and a permanent declaration that the decision is unreasonable.

[9] The CTR, provided in redacted form to the Respondents, as described above, consists of the Memo and the Permit. The original redactions to the Memo were minimal; two and a half lines on page 4, and three parts of three lines on page 6. The redactions to paragraph 19 on page 4 and part of the redactions to paragraph 28 on page 6 have recently been lifted by the AGC.

II. Section 38, *Canada Evidence Act*

[10] Sections 38 to 38.15 (collectively referred to as section 38) of the CEA set out a procedure whereby information relating to international relations, national defence and national security may be protected from disclosure before a court, person or body with the jurisdiction to compel the production of information.

[11] Where information is otherwise required to be disclosed by a participant in connection with a proceeding and that participant believes that the information relates to international relations, national defence or national security (i.e. is sensitive or injurious), that person must give notice to the AGC (section 38.01). The AGC, upon review of the information, may authorize disclosure of all or part of the information (section 38.03). However, where the AGC does not authorize disclosure or does not enter into an agreement to permit disclosure of some facts or information subject to conditions (section 38.031), the AGC may apply to the Federal Court, as it has in this case, for an order confirming the prohibition on disclosure (section 38.04).

[12] The Court must now determine whether the prohibition on disclosure of the redacted information should be confirmed. The test to be applied by the Court in making this determination was established by the Federal Court of Appeal in *Canada (Attorney General) v Ribic*, 2003 FCA 246 [*Ribic*].

[13] In *Khawaja v Canada (Attorney General)*, 2007 FCA 388 [*Khawaja FCA*] at para 8, the Federal Court of Appeal reiterated the three part *Ribic* test in the form of questions to be addressed:

> (a) Is the information in question relevant to the proceeding in which disclosure is sought? If no, the information should not be disclosed. If yes, then,
>
> (b) Will disclosure of the information in question be injurious to national security, national defence, or international relations? If no, the information should be disclosed. If yes, then,
>
> (c) Does the public interest in disclosure of the information in question outweigh the public interest in prohibiting disclosure of

> the information in question? If yes, then the information should be disclosed. If no, then the information should not be disclosed.

[14] The party seeking disclosure, in this case, the Respondents, bear the onus of demonstrating that the redacted information is relevant (*Ribic* at para 17). However, the AGC has acknowledged that the redacted information would be relevant to the underlying Application for Judicial Review, noting that it is included in the CTR. As noted by Justice Mosley in *Attorney General of Canada v Almaki et al*, 2010 FC 1106, at para 60, "the threshold for determining relevance is low. The Court must consider the relevance of the information at issue to the underlying proceeding."

[15] The party seeking to protect the information and prohibit disclosure – in this case, the AGC – must demonstrate that disclosure of the information would be injurious to national security, national defence, or international relations (*Ribic* at para 20). The injury must be probable, not simply possible or speculative. Although some deference is owed to the AGC's assessment of probable injury due to the AGC's expertise and access to the information, the Court must still ensure that non-disclosure is justified ((*Canada (Attorney General) v Tursunbayev*, 2021 FC 719 [*Tursunbayev*] at para 86).

[16] If both relevance and probable injury are demonstrated, the party seeking disclosure must then demonstrate that the public interest in disclosure of the information is greater than the public interest in the non-disclosure (i.e., protection) of the injurious information (*Ribic* at para 21). Given that the party seeking disclosure does not have access to the information in order to so demonstrate, the Court conducts the balancing exercise, taking into consideration any public

written or oral submissions of the parties, the *ex parte* submissions of the AGC and *amicus* and the relevant factors established in the jurisprudence that guide the balancing exercise (see for example *Canada (Attorney General) v Khawaja*, 2007 FC 490, [2008] 1 FCR 547 [*Khawaja FC*] at paras 74 and 93; *Tursunbayev*, at paras 88-89.

[17] In the present case, given that the Respondents did not make public submissions, the Court has also considered the Notice of Application for Judicial Review which sets out the grounds for the Respondents' challenge to the Minister's decision as well as the submissions of the *amicus* with respect to how the redacted information may be relevant or probative in the underlying application.

III. The Submissions of the AGC

[18] The AGC submits that, although the redactions are minimal, disclosure of this information would be injurious. The AGC points to the evidence of their witness, who explained how disclosure would injure international relations and why this injury is probable, not simply speculative. The AGC notes that their witness stated that a prediction about injury could not be made with certainty but noted past events and other contextual information in support of their assessment that injury would be probable. With respect to the balancing of interests, the AGC submits that the redacted information is not crucial to the underlying application; rather, it would have minimal relevance, while its disclosure would have a serious impact.

IV. The *Amicus*' Submissions

[19] The *amicus* argues that the AGC has not established that an injury to international relations would be likely or probable. The *amicus* submits that no injury would arise from disclosure of the redacted information given that similar information is already in the public domain, including in various news articles.

[20] The *amicus* further submits that the AGC's witness did not specify with any certainty that the disclosure of the information that remains redacted would cause any injury. The *amicus* submits that the AGC's witness only speculates that injury is possible.

[21] The *amicus* adds that if the Court disagrees and finds that injury to international relations is probable and goes on to consider the third step in the *Ribic* test – the balancing – the redacted information could be of some use to support the Respondents' argument that the decision of the Minister of Foreign Affairs to grant the Permit is not reasonable. However, the *amicus* acknowledges that the redacted information would not be of significant relevance or probative value, which suggests that the public interest in disclosure would not outweigh the public interest in non- disclosure of the redacted information.

[22] The *amicus* does not seek any summary of the redacted information as an alternative to disclosure given that the redactions are minimal and a summary would not be feasible. The *amicus'* position is that the information is not injurious.

V. The Redactions Are Confirmed

[23] The AGC's witness described their professional experience and expertise in diplomatic relations and, in particular, bilateral international relations. The witness described the broad mandate of the Minister of Foreign Affairs, including responsibility for the conduct of international relations.

[24] The witness explained that the *Regulations* include prohibitions on providing engineering services and related services to energy distribution.

[25] The witness stated that the disclosure of the redacted information would injure international relations generally and in the context of the ongoing conflict between Russia and Ukraine. The witness elaborated on why injury to international relations would result from disclosure of the redacted information, noting that the impact of the disclosure would be broader than the specific issue regarding the maintenance of the turbine engines. The witness noted that Canada's support for Ukraine, including via the sanctions against Russia remains very strong.

[26] In *Tursunbayev*, at paras 73-86, Justice Noël addressed the meaning and scope of "international relations." Although there is no legislative definition, and flexibility is needed, the jurisprudence provides guidance on its meaning. Among the jurisprudence considered, Justice Noël noted, at para 74, that in *Canada (Attorney General) v Almalki*, 2010 FC 1106, Justice Mosley described international relations as "being linked to both the impact of

disclosure of such information on Canada's relations abroad and the importance of frank exchanges between diplomats."

[27] Justice Noël also referred to his previous decision in *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials)*, 2007 FC 766, [2008] 3 FCR 248 [*Arar*], at para 61, where he stated that information injurious to international relations is "information that if disclosed would be injurious to Canada's relationship with foreign nations."

[28] Justice Noël provided a summary at para 78, noting that "international relations encompass the exchange of information between foreign nations and the ability to conduct such exchanges in an atmosphere of trust to ensure the information is as complete and accurate as possible. Releasing such information could compromise or impair the trust of not only the nation to whom it relates, but of other foreign nations as well. Canada benefits tremendously from these exchanges and it must maintain the trust of all foreign nations to continue to benefit from those."

[29] The Court finds, as acknowledged by the AGC, that the redacted information would be relevant to the Respondents in their underlying Application for Judicial Review. The Court again notes that the threshold for determining relevance at the first step of the *Ribic* test is low, particularly in the context of civil proceedings.

[30] The Court also finds that the AGC has established that the disclosure of the redacted information would cause injury to international relations. The Court has considered the evidence of the AGC's witness as provided in the affidavits and oral testimony and the answers in response to a rigorous cross-examination by the *amicus*. The Court has also considered that the AGC's witness has significant experience in international relations. The Court also notes that newspaper accounts of possibly similar information – that were not provided as evidence – do not detract from the evidence of the AGC's witness. The Court is satisfied that injury to international relations is probable, not simply possible. The *amicus* carefully probed this issue and the witness's unwavering evidence is that, based on past events and the current circumstances, injury to international relations is probable, although this is not a certainty. The witness also described the nature of the injury as "not insignificant". The Court notes that the "probable injury" standard does not require certainty.

[31] As noted in *Tursunbayev*, at paras 82-86, the Court must ensure that the redactions proposed by the AGC are justified and be satisfied that the evidence tendered shows that injury to international relations from disclosure of the redacted information is probable, not simply possible. Although a degree of deference is owed to the AGC's assessment of injury, given their expertise and access to the information, the Court must scrutinize the evidence and ensure that injury is probable and, if so, go on to the balancing test. The Court has done so, taking into account the evidence and the scope of meaning of international relations.

[32] Turning to the third step in the *Ribic* test, the Court has considered the relevant factors, including the low probative value of the redacted information in the context of the issues raised

in the Notice of Application for Judicial Review and the nature of the injury that would probably arise if the redacted information were publicly disclosed. The Court finds that the public interest in disclosure to the Respondents of the redacted information would be outweighed by the public interest in non-disclosure (i.e. safeguarding) the information.

[33] In conclusion, the prohibition on the disclosure of the information that remains redacted in the Memo is confirmed.

[34] The Application Record of the AGC and the evidence and submissions received in the *in camera ex parte* proceedings will be kept in the Designated Proceedings Registry of the Federal Court.

ORDER in DES-6-22

THIS COURT ORDERS that:

1. The Application is granted to prohibit the disclosure of the redacted information.

2. The prohibition on the disclosure of the information in the Memo that remains redacted and is the subject of this Application is confirmed in accordance with subsection 38.06(3) of the *Canada Evidence Act*.

3. The Attorney General of Canada shall provide the Respondent with replacement pages to reflect the lifting of redactions that have been authorized by the AGC at pages 6 and 8 of the Memo and to reflect the redactions at paragraph 28 on page 6, which are confirmed by the Court.

4. The Attorney General of Canada shall propose any necessary redactions to this Order and Reasons within three days, after which time the Order and Reasons will be issued publicly.

5. The *in camera ex parte* Court records relating to this Application shall be kept under seal at the Federal Court's secure facility, to which the public has no access.

6. There is no order as to Costs.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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